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Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

The contract in this case differs from the contract in the *Moorman*[1] case, in that in the *Moorman* case the contract provided that *all* disputes were to be decided by the Contracting Officer, whereas in the instant case the contract provides that all disputes concerning *questions of fact* (R. 16) were to be decided by the Contracting Officer subject to appeal to the Head of the Department. The instant contract is the usual and standard form of contract which has been before the United States Supreme Court and the United States Court of Claims on numerous occasions. The *Moorman* case was an exceptional case and, it is respectfully submitted, should be limited to its own particular facts.

Arbitrariness, Unreasonableness and Gross Mistake were Alleged, Proved and Found by the Court

The brief of the Government proceeds upon the erroneous premise that gross mistake and bad faith were not presented by the pleadings, nor was the case tried upon that premise.

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[1] *Moorman* v. *United States*, 338 U. S. 457.

The Claim of respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *under-estimated the amount of value* of the labor performed and materials furnished • • • ". (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.[2]

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.[3]

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[2] An examination of the trial record discloses that with regard to items 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 covered by the Commissioner's findings, the defendant did not submit any evidence to controvert, refute or dispute plaintiff's claim of the amount of damage.

All of the quantities testified to by plaintiff were based on actual field measurements.

None of the quantities allowed by defendant were based on actual field measurements nor were any quantities, as testified to by defendant's witnesses, based on original records made in the field (R. 269 & 370).

Defendant did not attempt to justify, explain or prove the accuracy of any of the quantities or amounts allowed plaintiff. Defendant practically rested its case on the figures it allowed plaintiff.

If such action by the defendant is not arbitrary, unreasonable and so palpably in bad faith as to justify a review by the Court and a reversal if in error, then such a situation is hard to imagine.

[3] With regard to the Pole item the Government admitted that respondent's original proposal was $70 per pole—and further admits that no poles were shown on the Contract Drawings (R. 501 & 502).

Contract Provisions Should Not Be So Strictly Construed As to Deprive a Contractor of the Right to Have the Courts Review the Decisions and Interpretations of Governmental Employees Who Owe Their Allegiance to Their Employer and Whose Duties Require Them to Protect the Interest of the Government.

The Government is attempting to go beyond all conscience and reasonableness in its present application. It is quite frank in what it is attempting to accomplish and from this frankness we find the extent of the arbitrariness and unreasonableness to which it attempts to carry the Contract provisions.

At page 22 of its brief the Government states its position to be that "Were the decision to be final *only if correct* there would be little purpose in including the finality provisions in the Contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes" and at pages 18 and 19 of its brief states "Since the Arbiters designated in Standard Government Contracts are *always* employed by the Government, *always* owe allegiance to the Government, and the duties of their employment *always* require them to protect the interests of the Government * * *". (Italics ours.) Yet in spite of this the Government still wants the Contractor to be absolutely and irrevocably bound, without any recourse whatsoever, from the decisions of such biased persons.

The admission by the Government in its petition, that the parties who are asked to decide the questions are biased in its favor and owe it allegiance, brings it directly within the rule of *Ripley* v. *U. S.*, 223 U. S. 695, 701, and makes the ruling subject to review (R. 27).

The Court of Claims defined specifically that bias should not enter into any decision, which rule as enunciated should be held up as a beacon determining the standard to be followed by all deciding parties designated by contracts (R. 28 & 29).

> "We are always loath to say that a governmental official has acted in bad faith. Indeed in the many cases that have come before this court there have been but very few instances in which we have found, or thought, that the contracting officer was unfaithful to the Government. Their fidelity is beyond reproach. But it often happens that they misconceive their function. Faithful to the Government they almost always are, but frequently they are lacking in impartiality. And, yet, this is the duty the dispute clause of the contract (article 15) casts upon them.
>
> "It is a duty not easily to be discharged, we know. They are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for. Many contractors, on the other hand, bent upon making as much money as they can out of the contract, are constantly seeking ways out of doing this and doing that. Frequently, it is a constant battle—the contracting officer as the Government's representative, on the one hand, and the contractor on the other. To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon him a burden difficult to bear. And yet the contract requires him to do so.
>
> "So, if any case we say tnat the contracting officer has not acted in good faith, we mean only that he has

not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

"We take it then that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

"In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him."

The Government in effect is asking the Court to hold that any contract provision, whether or not it is limited to questions of fact or unlimited as to the subject of disputes, forever forecloses the Contractor from having the decision of the biased employees of the Government reviewed by any court of competent jurisdiction.

No Real Appeal Was Ever Granted to Respondent by the Head of the Department.

The Government's prime argument is the fact that the decision of the person designated in the Contract, to wit, the Head of the Department, is final and conclusive on the parties and plaintiff should not be questioned in the absence of gross error or fraud, etc.

In the numerous appeals taken by the Contractor from the arbitrary, unreasonable and palpable erroneous decisions of the contracting officer, the contractor repeatedly kept requesting an oral hearing, but no oral hearing was ever granted. The Contractor's appeals from the action of the Contracting Officer to the Secretary of Commerce were duly and promptly taken, but after the appeals were taken months would elapse before the Secretary of Commerce even acknowledged the receipt of the appeal. As a matter of fact, in most instances, the Secretary of Commerce never even gave the Contractor the courtesy of an acknowledgment of the appeals.[4]

On substantially all of plaintiff's appeals, the Head of the Department, to wit, the Secretary of Commerce, never even made a decision on the action of the Contracting Officer. So that, while the contract provided that an appeal should be taken to the Head of the Department from the action of the Contracting Officer, the Head of the Department, in this case, never actually rendered a decision on these appeals. All the Head of the Department did was act as a rubber stamp for the Contracting Officer, he made no formal decision nor did he make any findings. If this is not actions of such manner as would necessarily imply bad faith, then it can never be found.

At least the Contractor should be given a hearing before an impartial Board to determine the basis and justification

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[4] Respondent took numerous appeals from the Actions of the Contracting Officer (Exhibit 45—R. 283 and 284; Exhibit 48—R. 288; Exhibit 49—R. 288 and 289; Exhibit 54—R. 294; Exhibit 60—R. 297; Exhibit 61—R. 298). The Head of the Department, in this case, the Secretary of Commerce, did nothing about the appeals until many months had elapsed and then, instead of granting a hearing or asking the parties to appear before him or for evidence, merely let the rulings of the Contracting Officer stand.

of its claim. We find in some Governmental Bureaus, such as the Navy and Army Department, a Board of Contract Appeals designated by the Head of the Department, which Boards are composed of one or three disinterested parties, who are not in the employ of the Government and whose duties do not require them to protect the interests of the Government. These Boards hear the appeal and make formal findings after hearing both parties. This was not done in the instant case; the Contractor was never given a hearing.

The Government is asking this Court to affirm the actions of the Contracting Officer, whose decisions are not made final under the contract, in a case where the Contractor was never afforded an opportunity to present his proofs or be present at a hearing before the Head of the Department. Such action is not democracy at work, but arbitrary dictatorship.

Will this Court say that the Contracting Officer whose sole duty it is to be as strict with the Contractor as possible, is to be allowed to make decisions which when presented to the Head of the Department are casually affirmed without any further questioning, and make Contractors accept such procedure without any recourse to the Courts? If such a situation is to be countenanced by the Court, then take out of the contracts all right of appeal and all right of review and put in one clause making the Contracting Officer the sole judge of which he wants or does not want with an express provision that his actions become the law of the case and once a pronouncement has been uttered by the Contracting Officer, his order is inviolate, unquestioned and unquestionable. When such a situation occurs, and such a rule of law is pronounced, governing public contracts; public bidding and benefits by way of

public bidding to the Government become a mere idle gesture.

If such an interpretation is ever placed on clauses of this nature, then the entire purpose and nature of a contract with the Government is effectively and completely frustrated insofar as the Contractor's rights are involved. The requirement for plans and specifications and details regarding the nature of the work become meaningless.

The Government contends that an *incorrect interpretation or a biased interpretation* is final and conclusive on the Contractor. Only the Government then would have any rights under the contract. If this be so we might just as well write a clause in the contract in substantially the following words:

> "The contractor agrees to furnish all labor and material of any nature whatsoever, to be performed in such manner and furnished in such quantities and at such times as the Government's representatives may direct, without limit or restriction."

Any Contractor who then bids a job will know that he is opening up his bank account, his credit and all his assets to the whims and dictates of the Governmental officers in charge of the project, be they right or wrong in their requirements. Anything that they want, he must comply. Any interpretation they make is final and no one may ever review their acts.

It is hard to orient one's mind to such an argument from Governmental counsel in a democracy. A dictatorship might ask for or require such an arbitrary determination. No contract should ever be allowed to be so interpreted as to put one of the contracting parties at the complete

and absolute mercy of the other without any recourse to any court of law, be the other party arbitrary, unreasonable, fair or unfair, right or wrong.

We must repeat what the Government says at page 22 of its brief: "Were the decision to be final *only if correct*, there would be little purpose in including the finality provision in the contract * * * *it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto.*" (Italics ours.) If what the Government wants is granted, then we might as well scrap our system of democracy and discard the Judiciary from any review of Governmental action.

Bias, Error, Arbitrary or Unreasonable Actions on the Part of Parties Charged with the Observance and Enforcement of Contract Provisions Should Not Be Allowed to Stand Inviolate and Not Subject to Review by the Courts.

The Government's brief repeats over and over again the one argument:—Regardless of error—regardless of how the decision came about—regardless of the justification for the findings—regardless of how arbitrary and unreasonable the decision may be—the decision is inviolate, unquestionable and cannot be reviewed by the Courts.

Such an argument is directly contrary to the basic concept of our democracy. In creating our form of government the Constitution provided for a system of checks and balances for all Governmental Acts. Are we to now say that a clause in a contract, prepared by the Government, deprives the Contractor of the same right of checks and balances? That the Executive Branch of the government

who makes the decision is not subject to review by the Judicial Branch of our Government?

If the right of review by the Courts is taken from the Contractor, where will these limitations stop? Where does one draw the line? When is the action of the Head of the Department subject to review—if, as the government argues—it is not subject to review merely because it is wrong?

At such time as the courts rule, as a matter of law, that the contract provisions hold as the Government contends, at that time the courts will deprive the Contractors of any security or reasonableness in their bid and will make public bidding an outright gamble. No longer will any contractor with the Government have any protection, rights or remedies of any nature except an appeal to a prejudiced employee of the Government who owes his livelihood, his allegiance and his future to the party against whom he is asked to rule. When that day comes it is safe to say that the Government will no longer be able to obtain competitive bids. Any man who will risk signing a contract and obligating himself to do whatever an employee of the other side may require, might just as well devote his time and energy to rolling dice or betting on horses with a more reasonable opportunity for success and profit than he would possibly have in a Government contract.

The Government under the interpretation that it is now asking the Court to give to its form of contract, would in short order find itself paying many times the fair value of the work, for every Contractor would be compelled to include in his bid not only the fair value of the work which he thinks he might be required to do, but also the value of any other item directly or indirectly related to the work or project which a biased employee of the Govern-

ment may require him to furnish and perform, without limitation or restriction of any kind.

The Contractor has absolutely no say or discretion in the form of contract he is obligated to sign when doing public work, be it Federal, State or Municipal. While the statement has often been made that the Contractor does not have to bid the contract in the first instance, this argument begs the question and does not answer the purposes of public bidding.

Public bidding was designed to give the Government the opportunity of obtaining the best price from the lowest responsible bidder for the performance of public work, and in comparison with private work the Government's costs have been far below that which private individuals have to spend for comparable structures. Certainly the Contractor can stay out of business, it is true, but if he desires to do public work, which is open to everyone qualified, whereas private work is limited to select parties, then the Contractor must accept the Government's form of contract, "take it or leave it". To that extent the Contractor is not a free agent in determining whether or not he will accept the form of contract offered.

This Court and every other court in the Country, so far as the writer has been able to ascertain, have uniformly held that a contract should be construed most strongly against the party who drew it. Clauses such as Article 15 (R. 10) should be strictly construed against the Government.

As stated by the Court in *Armstrong & Co.* v. *United States*, 98 Ct. Cl. 519, at page 526:

> "Where one party writes a contract in its own language, as the Government did here, and inserts in it

two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one, rather than the other, of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him."

As stated by the New York Court of Appeals in the case of *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 144:

> "In the administration of justice the Courts will ever carefully scrutinize contracts which by their terms arbitrarily place one party thereto solely at the mercy of the other party to the instrument and in the interpretation of such contracts will adopt such construction as will be reasonable and just. Every contract implies good faith and fair dealing between the parties to the same."

Also in *Fleischman* v. *Furgueson*, 223 N. Y. 235, 241:

> "It is a well established canon of interpretation that in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may properly be taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other. (Schoellkopf v. Coatsworth, 166 N. Y. 77, 84; Heller v. Kalisch, 141 App. Div. 205, 207; Sanford v. Brown Bros. Co., 208 N. Y. 90, 96.)"

Also in *Campbell* v. *State of New York*, 240 App. Div. 304, 309:

> "Every contract implies good faith and fair dealing between the parties to it. The courts always avoid, if possible, any construction of a contract that it is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other. (Simon v. Etgen, 213 N. Y. 589.)"

> "The contractor had a right to rely on the good faith of the State and to expect that the contract would be construed in a reasonable and fair way (citation), * * *"

McEligot v. *State*, 246 App. Div. 121, 125.

The Contractor's appeals were as a matter of course determined against it by one who owes his allegiance and is biased in favor of the Government. The rulings of the Contracting Officer were consistently sustained without change or modification in any respect whatsoever, without opinion or findings of fact; yet the Government would now have this Court hold that in spite of such "star chamber proceedings" the Contractor has no further rights or remedies.

The situation as above described and as encountered by the Contractor in the instant case, is not an unusual one. As a matter of fact it is safe and fair to state that it is the usual and customary procedure followed by the Heads of the Departments in substantially all cases in which an appeal is taken from decisions of Contracting Officers where no Board is appointed to hear the appeal. The times when the Head of the Department overrules the Contracting Officer are so few and far between, that percentage-wise

they are negligible. How anyone can have the temerity to say that such a decision should without exception be final and conclusive is beyond comprehension.

The Court of Claims, which hears hundreds of these cases each year, is fully cognizant of the difficulties encountered by the Contractors, and when the stringent ruling in the *Moorman* case came down, the Court realized that the Contractors were faced with disastrous consequences, and we respectfully submit, rightfully, justifiably and in all good conscience has limited the rule of the *Moorman* case to its own particular facts. To do otherwise would be to write the clause in the contract that we have attempted to set forth above. It was never so contemplated and it should never be allowed.

The best expression of the limitation of the *Moorman* case and how it should be restricted in the instant case was recently expressed by the United States Court of Claims in the case of *Wunderlich, et al.* v. *United States,* decided June 5, 1950, No. 43307, in which the Court stated:

> "In the *Moorman* case, *supra,* the Government apparently urged that the question there presented of interpretation of the language of the contract was a question of fact and that, therefore, even if Article 15 was applicable, the departmental decision was final. The court said:
>
> > But while there is much to be said for the argument that the 'interpretation' here presents a question of fact, we need not consider that argument. For a conclusion that the question here is one of law cannot remove the controversy from the ambit of par. 2-16 of the specifications.

In view of this observation of the Supreme Court, we have re-examined the doctrine heretofore applied by this court to this problem.

"We are, of course, aware that questions of the interpretation of written documents are not, speaking with analytical accuracy, in most cases questions of law in the sense that a lawyer or a judge has the special skill needed to answer them. They may be questions of agriculture, or engineering, or finance, or medicine, or law. In the division of judicial functions between the judge and the lay jury which only by accident would have the requisite skill in a particular case, the judge reserved this function to himself, presumably as being more competent than the jury. And judges and lawyers began to call the questions 'questions of law,' as a short way of saying that they should be decided by the judge. This method of expression, though analytically inaccurate was, so far as we know, quite universal. All the courts, including the Supreme Court of the United States, used it, and applied it with serious consequences. *Hamilton* v. *Liverpool, London and Globe Insurance Co.*, 136 U. S. 242, 255, *Bliven, et al.* v. *New England Screw Co.*, 23 How. 420, 433; *Turner, et al.* v. *Yates*, 16 How. 14, 23. Where appellate courts have had jurisdiction to review questions of law but not questions of fact, they have held that they could review questions as to the interpretation of contracts. See *United States* v. *E. J. Biggs Construction Co.*, 116 Fed. 2d 768, 770. Similar statements and decisions were early made by this court with reference to the finality of the decisions of a designated officer in problems arising in government contracts. *Lyons* v. *United States*, 30 C. Cls. 352, 365; *Collins and Farwell* v.

United States, 34 C. Cls. 294, 332. Other Federal Courts held likewise. *Lewis, et al.* v. *Chicago, S. F. & Co. Ry. Co.*, 49 F. 708, 710, 713; *King Iron Bridge & Manufacturing Co.* v. *City of St. Louis*, 43 F. 768. The Government has cited us no authority to the contrary.

"In view of the unanimity of statement by courts that questions of the interpretation of written documents were 'questions of law' the plaintiff urges that the representatives of the Government, and of contractors, who adopted Standard Form 23 which included Article 15, chose the language there used in the light of the then universal usage of the courts, and hence did not mean to include questions of the interpretation of written contracts within the 'questions of fact' which were made subject to final departmental decision. This court and other courts dealing with the question have interpreted Article 15 as the plaintiff would have it interpreted. *Albina Marine Iron Works, Inc.* v. *United States*, 79 C. Cls. 714, 722; *Davis, et al. Trustees* v. *United States*, 82 C. Cls. 334, 346-347; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 477; *Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 33; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 616-617; *Ruff* v. *United States*, 96 C. Cls. 148, 165; *B-W Construction Company* v. *United States*, 97 C. Cls. 92, 118-119; *John McShain, Inc.* v. *United States*, 97 C. Cls. 281, 295; *Gerhardt F. Meyne Co.* v. *United States*, 110 C. Cls. 527, 548. Other Federal Courts have given the same interpretation to this standard Government contract provision. *General Steel Products Corporation* v. *United States*, 36 F. Supp. 498, 502; *Lundstrom* v. *United States*, 53 F. 2d 709, 711. See also *Central Nebraska Public Power and*

Irrigation District v. *Tobin Quarries,* 157 F. 2d 482, 486.

"Of greater significance, perhaps, is the fact that the Government itself, through its Boards of Contract Appeals set up in the departments to act as the authorized representative of the heads of departments to hear and decide appeals by contractors from the decisions of contracting officers, has also interpreted Article 15 of the standard contract as not including, in its expression 'disputes concerning questions of fact', disagreements as to the interpretation of written contracts. Thus these Boards have, at the urging of the Government, dismissed appeals because they involved such questions. Appeal of *W. F. Trimble & Son Co.,* 1 CCF. 47, 48; Appeal of *Fred A. M. de Groot, Inc.,* 1 CCF. 148, 149; Appeal of *Central Engineering & Contracting Corporation,* 3 CCF. 989, 992; Appeal of *Ross Engineering Company,* 3 CCF. 1153, 1155.

"In the current 'Charter for the Armed Services Board of Contract Appeals', effective May 1, 1949, modified June 30, 1949, in paragraph 4 appears this language:

> When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.

If the Board 'in its discretion' chose not to consider and decide the pertinent questions of law it would not, presumably, decide the case, hence resort to a court would seem to be open to the contractor. The drafts-

men of the charter were apparently using the expression 'questions of law' with the analytically inaccurate but judicially common meaning described above. The Board, acting under the charter, treats questions of the interpretation of contracts as 'questions of law' and decides them, or refuses to decide them, in its discretion. See Appeal of *B. G. Cury Co.*, ASBCA No. 227, Oct. 27, 1949; Id. ASBCA No. 228, Oct. 27, 1949; Id. ASBCA No. 286, Nov. 21, 1949: *Erman Howell Division, Luria Steel and Trading Corporation*, ASBCA No. 188, Nov. 29, 1949; *Franklin Iron and Metal Co.*, ASBCA No. 194, Nov. 30, 1949. We think it would be intolerable that this court should refuse to consider claims involving interpretation of contracts, when the departmental board is directed to hear them only 'in its discretion'. Is the contractor supposed to have agreed that he may have a departmental ruling only if the departmental board chooses to give him one; that he may find out whether they will give him one only by going to the trouble and expense of preparing the case for the board, but that if they do choose to give him a ruling, it will be final?

"When the Boards have decided questions of interpretation on appeal, they have made it plain that they were doing so, not because the 'disputes concerning questions of fact' clause of the contract authorized them to do it, but because the plaintiff had asked for the decision and the head of the department had authorized the board to make it. See Appeal of *Robert E. McKee*, BCA No. 1617, Jan. 21, 1948; Appeal of *S. K. Jones Construction Co.*, BCA No. 1619, Feb. 6, 1948. See our decision of today in *McWilliams Dredging Co.* v. *United States*, No. 48894, for an explanation

of why such a decision of the Board does not foreclose the contractor from litigating the question in a court."

A clearer enunciation of the law cannot be expressed.

It is respectfully submitted that there is no basis or justification for any expansion of the *Moorman* case. The facts and contract provisions in the instant case are different and in no manner create any question or conflict with the *Moorman* case. The distinctions and limitations as defined by the Court of Claims in this case and in the *Wunderlich* case are sound and should not be disturbed.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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Attorneys for Respondent.

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[1] *Moorman* v. *United States*, 338 U. S. 457.

The Claim of respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *under-estimated the amount of value* of the labor performed and materials furnished • • • ". (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.[2]

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.[3]

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[2] An examination of the trial record discloses that with regard to items 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 covered by the Commissioner's findings, the defendant did not submit any evidence to controvert, refute or dispute plaintiff's claim of the amount of damage.

All of the quantities testified to by plaintiff were based on actual field measurements.

None of the quantities allowed by defendant were based on actual field measurements nor were any quantities, as testified to by defendant's witnesses, based on original records made in the field (R. 269 & 370).

Defendant did not attempt to justify, explain or prove the accuracy of any of the quantities or amounts allowed plaintiff. Defendant practically rested its case on the figures it allowed plaintiff.

If such action by the defendant is not arbitrary, unreasonable and so palpably in bad faith as to justify a review by the Court and a reversal if in error, then such a situation is hard to imagine.

[3] With regard to the Pole item the Government admitted that respondent's original proposal was $70 per pole—and further admits that no poles were shown on the Contract Drawings (R. 501 & 502).

Contract Provisions Should Not Be So Strictly Construed As to Deprive a Contractor of the Right to Have the Courts Review the Decisions and Interpretations of Governmental Employees Who Owe Their Allegiance to Their Employer and Whose Duties Require Them to Protect the Interest of the Government.

The Government is attempting to go beyond all conscience and reasonableness in its present application. It is quite frank in what it is attempting to accomplish and from this frankness we find the extent of the arbitrariness and unreasonableness to which it attempts to carry the Contract provisions.

At page 22 of its brief the Government states its position to be that "Were the decision to be final *only if correct* there would be little purpose in including the finality provisions in the Contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes" and at pages 18 and 19 of its brief states "Since the Arbiters designated in Standard Government Contracts are *always* employed by the Government, *always* owe allegiance to the Government, and the duties of their employment *always* require them to protect the interests of the Government * * *". (Italics ours.) Yet in spite of this the Government still wants the Contractor to be absolutely and irrevocably bound, without any recourse whatsoever, from the decisions of such biased persons.

The admission by the Government in its petition, that the parties who are asked to decide the questions are biased in its favor and owe it allegiance, brings it directly within the rule of *Ripley* v. *U. S.*, 223 U. S. 695, 701, and makes the ruling subject to review (R. 27).

The Court of Claims defined specifically that bias should not enter into any decision, which rule as enunciated should be held up as a beacon determining the standard to be followed by all deciding parties designated by contracts (R. 28 & 29).

> "We are always loath to say that a governmental official has acted in bad faith. Indeed in the many cases that have come before this court there have been but very few instances in which we have found, or thought, that the contracting officer was unfaithful to the Government. Their fidelity is beyond reproach. But it often happens that they misconceive their function. Faithful to the Government they almost always are, but frequently they are lacking in impartiality. And, yet, this is the duty the dispute clause of the contract (article 15) casts upon them.
>
> "It is a duty not easily to be discharged, we know. They are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for. Many contractors, on the other hand, bent upon making as much money as they can out of the contract, are constantly seeking ways out of doing this and doing that. Frequently, it is a constant battle—the contracting officer as the Government's representative, on the one hand, and the contractor on the other. To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon him a burden difficult to bear. And yet the contract requires him to do so.
>
> "So, if any case we say that the contracting officer has not acted in good faith, we mean only that he has

not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

"We take it then that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

"In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him."

The Government in effect is asking the Court to hold that any contract provision, whether or not it is limited to questions of fact or unlimited as to the subject of disputes, forever forecloses the Contractor from having the decision of the biased employees of the Government reviewed by any court of competent jurisdiction.

No Real Appeal Was Ever Granted to Respondent by the Head of the Department.

The Government's prime argument is the fact that the decision of the person designated in the Contract, to wit, the Head of the Department, is final and conclusive on the parties and plaintiff should not be questioned in the absence of gross error or fraud, etc.

In the numerous appeals taken by the Contractor from the arbitrary, unreasonable and palpable erroneous decisions of the contracting officer, the contractor repeatedly kept requesting an oral hearing, but no oral hearing was ever granted. The Contractor's appeals from the action of the Contracting Officer to the Secretary of Commerce were duly and promptly taken, but after the appeals were taken months would elapse before the Secretary of Commerce even acknowledged the receipt of the appeal. As a matter of fact, in most instances, the Secretary of Commerce never even gave the Contractor the courtesy of an acknowledgment of the appeals.[4]

On substantially all of plaintiff's appeals, the Head of the Department, to wit, the Secretary of Commerce, never even made a decision on the action of the Contracting Officer. So that, while the contract provided that an appeal should be taken to the Head of the Department from the action of the Contracting Officer, the Head of the Department, in this case, never actually rendered a decision on these appeals. All the Head of the Department did was act as a rubber stamp for the Contracting Officer, he made no formal decision nor did he make any findings. If this is not actions of such manner as would necessarily imply bad faith, then it can never be found.

At least the Contractor should be given a hearing before an impartial Board to determine the basis and justification

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[4] Respondent took numerous appeals from the Actions of the Contracting Officer (Exhibit 45—R. 283 and 284; Exhibit 48—R. 288; Exhibit 49—R. 288 and 289; Exhibit 54—R. 294; Exhibit 60—R. 297; Exhibit 61—R. 298). The Head of the Department, in this case, the Secretary of Commerce, did nothing about the appeals until many months had elapsed and then, instead of granting a hearing or asking the parties to appear before him or for evidence, merely let the rulings of the Contracting Officer stand.

of its claim. We find in some Governmental Bureaus, such as the Navy and Army Department, a Board of Contract Appeals designated by the Head of the Department, which Boards are composed of one or three disinterested parties, who are not in the employ of the Government and whose duties do not require them to protect the interests of the Government. These Boards hear the appeal and make formal findings after hearing both parties. This was not done in the instant case; the Contractor was never given a hearing.

The Government is asking this Court to affirm the actions of the Contracting Officer, whose decisions are not made final under the contract, in a case where the Contractor was never afforded an opportunity to present his proofs or be present at a hearing before the Head of the Department. Such action is not democracy at work, but arbitrary dictatorship.

Will this Court say that the Contracting Officer whose sole duty it is to be as strict with the Contractor as possible, is to be allowed to make decisions which when presented to the Head of the Department are casually affirmed without any further questioning, and make Contractors accept such procedure without any recourse to the Courts? If such a situation is to be countenanced by the Court, then take out of the contracts all right of appeal and all right of review and put in one clause making the Contracting Officer the sole judge of which he wants or does not want with an express provision that his actions become the law of the case and once a pronouncement has been uttered by the Contracting Officer, his order is inviolate, unquestioned and unquestionable. When such a situation occurs, and such a rule of law is pronounced, governing public contracts; public bidding and benefits by way of

public bidding to the Government become a mere idle gesture.

If such an interpretation is ever placed on clauses of this nature, then the entire purpose and nature of a contract with the Government is effectively and completely frustrated insofar as the Contractor's rights are involved. The requirement for plans and specifications and details regarding the nature of the work become meaningless.

The Government contends that an *incorrect interpretation or a biased interpretation* is final and conclusive on the Contractor. Only the Government then would have any rights under the contract. If this be so we might just as well write a clause in the contract in substantially the following words:

> "The contractor agrees to furnish all labor and material of any nature whatsoever, to be performed in such manner and furnished in such quantities and at such times as the Government's representatives may direct, without limit or restriction."

Any Contractor who then bids a job will know that he is opening up his bank account, his credit and all his assets to the whims and dictates of the Governmental officers in charge of the project, be they right or wrong in their requirements. Anything that they want, he must comply. Any interpretation they make is final and no one may ever review their acts.

It is hard to orient one's mind to such an argument from Governmental counsel in a democracy. A dictatorship might ask for or require such an arbitrary determination. No contract should ever be allowed to be so interpreted as to put one of the contracting parties at the complete

and absolute mercy of the other without any recourse to any court of law, be the other party arbitrary, unreasonable, fair or unfair, right or wrong.

We must repeat what the Government says at page 22 of its brief: "Were the decision to be final *only if correct*, there would be little purpose in including the finality provision in the contract * * * *it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto.*" (Italics ours.) If what the Government wants is granted, then we might as well scrap our system of democracy and discard the Judiciary from any review of Governmental action.

Bias, Error, Arbitrary or Unreasonable Actions on the Part of Parties Charged with the Observance and Enforcement of Contract Provisions Should Not Be Allowed to Stand Inviolate and Not Subject to Review by the Courts.

The Government's brief repeats over and over again the one argument:—Regardless of error—regardless of how the decision came about—regardless of the justification for the findings—regardless of how arbitrary and unreasonable the decision may be—the decision is inviolate, unquestionable and cannot be reviewed by the Courts.

Such an argument is directly contrary to the basic concept of our democracy. In creating our form of government the Constitution provided for a system of checks and balances for all Governmental Acts. Are we to now say that a clause in a contract, prepared by the Government, deprives the Contractor of the same right of checks and balances? That the Executive Branch of the government

who makes the decision is not subject to review by the Judicial Branch of our Government?

If the right of review by the Courts is taken from the Contractor, where will these limitations stop? Where does one draw the line? When is the action of the Head of the Department subject to review—if, as the government argues—it is not subject to review merely because it is wrong?

At such time as the courts rule, as a matter of law, that the contract provisions hold as the Government contends, at that time the courts will deprive the Contractors of any security or reasonableness in their bid and will make public bidding an outright gamble. No longer will any contractor with the Government have any protection, rights or remedies of any nature except an appeal to a prejudiced employee of the Government who owes his livelihood, his allegiance and his future to the party against whom he is asked to rule. When that day comes it is safe to say that the Government will no longer be able to obtain competitive bids. Any man who will risk signing a contract and obligating himself to do whatever an employee of the other side may require, might just as well devote his time and energy to rolling dice or betting on horses with a more reasonable opportunity for success and profit than he would possibly have in a Government contract.

The Government under the interpretation that it is now asking the Court to give to its form of contract, would in short order find itself paying many times the fair value of the work, for every Contractor would be compelled to include in his bid not only the fair value of the work which he thinks he might be required to do, but also the value of any other item directly or indirectly related to the work or project which a biased employee of the Govern-

ment may require him to furnish and perform, without limitation or restriction of any kind.

The Contractor has absolutely no say or discretion in the form of contract he is obligated to sign when doing public work, be it Federal, State or Municipal. While the statement has often been made that the Contractor does not have to bid the contract in the first instance, this argument begs the question and does not answer the purposes of public bidding.

Public bidding was designed to give the Government the opportunity of obtaining the best price from the lowest responsible bidder for the performance of public work, and in comparison with private work the Government's costs have been far below that which private individuals have to spend for comparable structures. Certainly the Contractor can stay out of business, it is true, but if he desires to do public work, which is open to everyone qualified, whereas private work is limited to select parties, then the Contractor must accept the Government's form of contract, "take it or leave it". To that extent the Contractor is not a free agent in determining whether or not he will accept the form of contract offered.

This Court and every other court in the Country, so far as the writer has been able to ascertain, have uniformly held that a contract should be construed most strongly against the party who drew it. Clauses such as Article 15 (R. 10) should be strictly construed against the Government.

As stated by the Court in *Armstrong & Co.* v. *United States*, 98 Ct. Cl. 519, at page 526:

> "Where one party writes a contract in its own language, as the Government did here, and inserts in it

two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one, rather than the other, of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him."

As stated by the New York Court of Appeals in the case of *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 144:

"In the administration of justice the Courts will ever carefully scrutinize contracts which by their terms arbitrarily place one party thereto solely at the mercy of the other party to the instrument and in the interpretation of such contracts will adopt such construction as will be reasonable and just. Every contract implies good faith and fair dealing between the parties to the same."

Also in *Fleischman* v. *Furgueson*, 223 N. Y. 235, 241:

"It is a well established canon of interpretation that in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may properly be taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other. (Schoellkopf v. Coatsworth, 166 N. Y. 77, 84; Heller v. Kalisch, 141 App. Div. 205, 207; Sanford v. Brown Bros. Co., 208 N. Y. 90, 96.)"

Also in *Campbell* v. *State of New York*, 240 App. Div. 304, 309:

> "Every contract implies good faith and fair dealing between the parties to it. The courts always avoid, if possible, any construction of a contract that it is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other. (Simon v. Etgen, 213 N. Y. 589.)"

> "The contractor had a right to rely on the good faith of the State and to expect that the contract would be construed in a reasonable and fair way (citation), • • • "

McEligot v. *State*, 246 App. Div. 121, 125.

The Contractor's appeals were as a matter of course determined against it by one who owes his allegiance and is biased in favor of the Government. The rulings of the Contracting Officer were consistently sustained without change or modification in any respect whatsoever, without opinion or findings of fact; yet the Government would now have this Court hold that in spite of such "star chamber proceedings" the Contractor has no further rights or remedies.

The situation as above described and as encountered by the Contractor in the instant case, is not an unusual one. As a matter of fact it is safe and fair to state that it is the usual and customary procedure followed by the Heads of the Departments in substantially all cases in which an appeal is taken from decisions of Contracting Officers where no Board is appointed to hear the appeal. The times when the Head of the Department overrules the Contracting Officer are so few and far between, that percentage-wise

they are negligible. How anyone can have the temerity to say that such a decision should without exception be final and conclusive is beyond comprehension.

The Court of Claims, which hears hundreds of these cases each year, is fully cognizant of the difficulties encountered by the Contractors, and when the stringent ruling in the *Moorman* case came down, the Court realized that the Contractors were faced with disastrous consequences, and we respectfully submit, rightfully, justifiably and in all good conscience has limited the rule of the *Moorman* case to its own particular facts. To do otherwise would be to write the clause in the contract that we have attempted to set forth above. It was never so contemplated and it should never be allowed.

The best expression of the limitation of the *Moorman* case and how it should be restricted in the instant case was recently expressed by the United States Court of Claims in the case of *Wunderlich, et al.* v. *United States,* decided June 5, 1950, No. 43307, in which the Court stated:

> "In the *Moorman* case, *supra,* the Government apparently urged that the question there presented of interpretation of the language of the contract was a question of fact and that, therefore, even if Article 15 was applicable, the departmental decision was final. The court said:
>
> > But while there is much to be said for the argument that the 'interpretation' here presents a question of fact, we need not consider that argument. For a conclusion that the question here is one of law cannot remove the controversy from the ambit of par. 2-16 of the specifications.

In view of this observation of the Supreme Court, we have re-examined the doctrine heretofore applied by this court to this problem.

"We are, of course, aware that questions of the interpretation of written documents are not, speaking with analytical accuracy, in most cases questions of law in the sense that a lawyer or a judge has the special skill needed to answer them. They may be questions of agriculture, or engineering, or finance, or medicine, or law. In the division of judicial functions between the judge and the lay jury which only by accident would have the requisite skill in a particular case, the judge reserved this function to himself, presumably as being more competent than the jury. And judges and lawyers began to call the questions 'questions of law,' as a short way of saying that they should be decided by the judge. This method of expression, though analytically inaccurate was, so far as we know, quite universal. All the courts, including the Supreme Court of the United States, used it, and applied it with serious consequences. *Hamilton* v. *Liverpool, London and Globe Insurance Co.*, 136 U. S. 242, 255, *Bliven, et al.* v. *New England Screw Co.*, 23 How. 420, 433; *Turner, et al.* v. *Yates*, 16 How. 14, 23. Where appellate courts have had jurisdiction to review questions of law but not questions of fact, they have held that they could review questions as to the interpretation of contracts. See *United States* v. *E. J. Biggs Construction Co.*, 116 Fed. 2d 768, 770. Similar statements and decisions were early made by this court with reference to the finality of the decisions of a designated officer in problems arising in government contracts. *Lyons* v. *United States*, 30 C. Cls. 352, 365; *Collins and Farwell* v.

United States, 34 C. Cls. 294, 332. Other Federal Courts held likewise. *Lewis, et al.* v. *Chicago, S. F. & Co. Ry. Co.*, 49 F. 708, 710, 713; *King Iron Bridge & Manufacturing Co.* v. *City of St. Louis*, 43 F. 768. The Government has cited us no authority to the contrary.

"In view of the unanimity of statement by courts that questions of the interpretation of written documents were 'questions of law' the plaintiff urges that the representatives of the Government, and of contractors, who adopted Standard Form 23 which included Article 15, chose the language there used in the light of the then universal usage of the courts, and hence did not mean to include questions of the interpretation of written contracts within the 'questions of fact' which were made subject to final departmental decision. This court and other courts dealing with the question have interpreted Article 15 as the plaintiff would have it interpreted. *Albina Marine Iron Works, Inc.* v. *United States*, 79 C. Cls. 714, 722; *Davis, et al. Trustees* v. *United States*, 82 C. Cls. 334, 346-347; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 477; *Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 33; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 616-617; *Ruff* v. *United States*, 96 C. Cls. 148, 165; *B-W Construction Company* v. *United States*, 97 C. Cls. 92, 118-119; *John McShain, Inc.* v. *United States*, 97 C. Cls. 281, 295; *Gerhardt F. Meyne Co.* v. *United States*, 110 C. Cls. 527, 548. Other Federal Courts have given the same interpretation to this standard Government contract provision. *General Steel Products Corporation* v. *United States*, 36 F. Supp. 498, 502; *Lundstrom* v. *United States*, 53 F. 2d 709, 711. See also *Central Nebraska Public Power and*

Irrigation District v. *Tobin Quarries*, 157 F. 2d 482, 486.

"Of greater significance, perhaps, is the fact that the Government itself, through its Boards of Contract Appeals set up in the departments to act as the authorized representative of the heads of departments to hear and decide appeals by contractors from the decisions of contracting officers, has also interpreted Article 15 of the standard contract as not including, in its expression 'disputes concerning questions of fact', disagreements as to the interpretation of written contracts. Thus these Boards have, at the urging of the Government, dismissed appeals because they involved such questions. Appeal of *W. F. Trimble & Son Co.*, 1 CCF. 47, 48; Appeal of *Fred A. M. de Groot, Inc.*, 1 CCF. 148, 149; Appeal of *Central Engineering & Contracting Corporation*, 3 CCF. 989, 992; Appeal of *Ross Engineering Company*, 3 CCF. 1153, 1155.

"In the current 'Charter for the Armed Services Board of Contract Appeals', effective May 1, 1949, modified June 30, 1949, in paragraph 4 appears this language:

> When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.

If the Board 'in its discretion' chose not to consider and decide the pertinent questions of law it would not, presumably, decide the case, hence resort to a court would seem to be open to the contractor. The drafts-

men of the charter were apparently using the expression 'questions of law' with the analytically inaccurate but judicially common meaning described above. The Board, acting under the charter, treats questions of the interpretation of contracts as 'questions of law' and decides them, or refuses to decide them, in its discretion. See Appeal of *B. G. Cury Co.*, ASBCA No. 227, Oct. 27, 1949; Id. ASBCA No. 228, Oct. 27, 1949; Id. ASBCA No. 286, Nov. 21, 1949: *Erman Howell Division, Luria Steel and Trading Corporation*, ASBCA No. 188, Nov. 29, 1949; *Franklin Iron and Metal Co.*, ASBCA No. 194, Nov. 30, 1949. We think it would be intolerable that this court should refuse to consider claims involving interpretation of contracts, when the departmental board is directed to hear them only 'in its discretion'. Is the contractor supposed to have agreed that he may have a departmental ruling only if the departmental board chooses to give him one; that he may find out whether they will give him one only by going to the trouble and expense of preparing the case for the board, but that if they do choose to give him a ruling, it will be final?

"When the Boards have decided questions of interpretation on appeal, they have made it plain that they were doing so, not because the 'disputes concerning questions of fact' clause of the contract authorized them to do it, but because the plaintiff had asked for the decision and the head of the department had authorized the board to make it. See Appeal of *Robert E. McKee*, BCA No. 1617, Jan. 21, 1948; Appeal of *S. K. Jones Construction Co.*, BCA No. 1619, Feb. 6, 1948. See our decision of today in *McWilliams Dredging Co.* v. *United States*, No. 48894, for an explanation

of why such a decision of the Board does not foreclose the contractor from litigating the question in a court."

A clearer enunciation of the law cannot be expressed.

It is respectfully submitted that there is no basis or justification for any expansion of the *Moorman* case. The facts and contract provisions in the instant case are different and in no manner create any question or conflict with the *Moorman* case. The distinctions and limitations as defined by the Court of Claims in this case and in the *Wunderlich* case are sound and should not be disturbed.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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